No. 85-2163

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD L. JOHNSON, Administrator of the Estate of Ronald M. Johnson, Sr., Deceased,

Petitioner,

v.

MAX E. COLLEY and ALL-AMERICAN, INC., a corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Illinois may, under its procedural rules, correct what amounts to an inadvertent judgment contrary to its intended judgment declaring the law of Illinois, thereby fulfilling its Constitutional mandate?

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SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement is incomplete and omits and ignores the most important step in the procedural history of this case.

The Respondents, Max E. Colley and All-American, Inc., a corporation, filed a Motion for Leave to File a Motion to Reconsider the denial of a Petition for Leave to Appeal under the provisions of Supreme Court Rule 361,

Chapter 110A, §361, Smith-Hurd Illinois Annotated Statutes (1983), which said Motion was granted in *Johnson v. Colley*, 490 N.E.2d 685 (1986). Similar procedures, have long been sanctioned under the law of the State of Illinois. *Leathe v. Thomas*, 233 Ill. 430 (1908); *Barrett v. Shanks*, 382 Ill. 434 (1943).

REASONS WHY THE WRIT SHOULD BE DENIED

A.

THE SUPREME COURT OF ILLINOIS ACTED WITHIN ITS CONSTITUTIONAL MANDATE, ITS PROMULGATED RULES AND PRIOR PRECEDENT.

The Illinois Constitution of 1970 treats of the Judiciary in Article VI. Section 4 of that article defines the jurisdiction of the Supreme Court. The present case falls into none of the specific categories of subparagraphs §4(a) through (c), but only into the closing sentence of subparagraph (c). That provides:

> ARTICLE VI
>
> §4. SUPREME COURT–JURISDICTION
>
> (c) . . . The Supreme Court may provide by rule for appeals from the Appellate Court in other cases.

Section 16 of that same constitutional article provides:

> §16. ADMINISTRATION
>
> General administrative and supervisory authority over all courts is vested in the Supreme Court . . . The Supreme Court shall provide by rule for expeditious and inexpensive appeals.

There can be neither doubt nor argument that this case was one over which the Supreme Court of Illinois had jurisdiction, together with administrative authority over the Appellate Court of Illinois. Both flowed from its Constitutional mandate. Nor can there be question, after reading the Supreme Court of Illinois' Opinion, that that court found, not only that the Appellate Court had misapplied long-standing substantive rules of law (Petitioner's Appendix, A-5, A-6), but that the Appellate Court had also exerted administrative powers over the trial court level of Illinois Courts which it did not possess. (Petitioner's Appendix, A-5). Clearly, within its Constitutional mandate, the Supreme Court of Illinois had a right, and a duty, to exert its powers to correct an erroneous practice within the Court system it monitors and administers. It did so.

It is true, as Petitioner states, that the Supreme Court had promulgated a rule on November 15, 1979, denying the right to file a motion for reconsideration of a denial of a petition for leave to appeal. It is equally true that that same court had instituted rules for general motion practice. Chapter 110A, §361, Smith-Hurd Illinois Annotated Statutes (1983). That latter practice was followed by Respondents. A Motion for Leave to File a Motion for Reconsideration was filed in apt time. (Petitioner's Appendix, A-3). It was allowed. The Clerk of the Supreme Court of Illinois was directed by that Court to accept the Motion for Reconsideration under the general constitutional powers of the court. The court then considered the Petition for Leave to Appeal and granted it. Not only that, but the Petitioner filed opposing papers which, in effect, presented the same arguments now made to this court. (Petitioner's Appendix, A-3).

Petitioner ignores this vital intermediate step (see page 3, Petitioner's *Statement of the Case*). The Supreme Court of Illinois did not. It stated:

> "Recognizing that our authority stems from the Constitution and not from our infallibility and consistent with precedent (see *Leathe v. Thomas* (1908), 233 Ill. 430), this court, on several occasions, has allowed a motion filed in accordance with Rule 361 (87 Ill.2d R. 361) for leave to file a Motion for Reconsideration. That procedure was followed here, . . ." (Petitioner's Appendix, A-3).

In short, the Supreme Court of Illinois followed its own rules in arriving at a position from which it might exercise its constitutional powers over the court system of the state in which it administers the judicial power. There was no deprivation of property without due process of law nor without equal protection of the laws of Illinois. The same procedure lies open to use by any litigant before that court.

History, as evidenced by precedent, demonstrates that the Supreme Court of Illinois has taken a second look at matters before it in the past. The opinion here attacked refers to the 1908 case of *Leathe v. Thomas*, 233 Ill. 430 (1908) in which leave was given to file a second petition for reconsideration of a judgment of the court. While the 1908 court did not rule favorably on that petition, it did accept it and pass upon its merits, given the circumstances. The language of the opinion indicates that that court was being careful to avoid a ruling ". . . where by some inadvertence a judgment has been entered here other than the judgment which the court intended to render." 233 Ill. 430, 431 (1908). It may reasonably be argued in the present case that exactly that exception applies. The original denial of the petition had the effect of granting a judgment of $1,282,488.96 to present petitioner. The unanimous opinion of the Supreme Court of Illinois, on full consideration of the merits, arrived at exactly the opposite result. (Petitioner's Appendix, A-6). It cannot be argued logically that the original denial of

the Petition for Leave to Appeal was intended to render a judgment that the Supreme Court of Illinois later unanimously rejected.

Research discloses that the *Leathe* opinion, excepting for the present opinion in *Johnson v. Colley*, 490 N.E.2d 685 (1986), has only been cited on one other occasion. That was in *Barrett v. Shanks*, 382 Ill. 434 (1943). There the Appellate Court granted a *second* Petition for Reconsideration of a judgment and actually rendered a *third* opinion which was in uniformity with the first two opinions. While condemning the practice, the Illinois Supreme Court specifically held that it was procedural and not jurisdictional and that the third opinion had the force of law. *Barrett v. Shanks*, 382 Ill. 434, 443-445 (1943). It must be observed that both *Leathe* and *Barrett* involve prior decisions on the merits. This case does not. In this case, the court, on consideration of the merits, obviously decided that its first ruling on the Petition for Leave to Appeal was contrary to the law of Illinois. Exercising its constitutional prerogative, the court corrected that procedural error, not a jurisdictional problem.

There was no deprivation of property without due process of law. The Supreme Court of Illinois merely corrected a procedural error under the procedures it had established. It thus exercised its constitutional rights and duties. It should be sustained.

B.

THE PRESENT PETITION FALLS FAR SHORT OF THE STANDARD APPLIED BY THIS COURT IN GRANTING WRITS OF CERTIORARI.

As noted in Petitioner's filing, the only parties affected are the Petitioner-Administrator and the two Respondents. By this opinion, Petitioner loses a money judgment and

Respondents are relieved from payment of that judgment. In the light of the paucity of reported cases in Illinois—the only jurisdiction affected by these rules—it appears there can never be other litigants affected by the granting or denial of certiorari.

Consequently, this petition falls far short of the standard this court has applied in the past to select cases worthy of granting certiorari. Certainly, by no stretch of the imagination, does it approach the national importance of the cited case of *United States v. Nixon, President of the United States, et al.*, 418 U.S. 683 (1974). Perhaps the closest parallel amongst petitioner's supporting cases is *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). Additionally, the *Rice* case sets forth some history of, and rationale for, the granting or withholding of certiorari. A rather complex procedural history lay behind the court's opinion on a petition for rehearing and, thus, complicates the opinion. The underlying facts were that the plaintiff had purchased a cemetery lot from defendant. The deed co. ained a clause excluding non-Caucasians from burial in the lot. The plaintiff's husband was an American Indian and his burial was refused. Suit was commenced and the contractual clause was raised as a defense. The Iowa Legislature passed a statute during the pendency of the litigation outlawing such restrictive clauses. The Iowa Supreme Court sustained the defense and a petition based upon the alleged constitutional deprivation of property was granted.

Disregarding certain intermediate procedural steps, the controversy came before the full court on the issue of whether the petition should have been granted. A divided court held that the petition had been improvidently granted and dismissed it.

The majority, in ruling, took note of the question of whether there were special and important reasons for review of the case. It noted that the Court did not sit to satisfy a scholarly interest in legal issues, nor, most importantly, it did not sit for the benefit of particular litigants. 349 U.S. 70 at 74.

Stating that the impact of the Iowa statute had not been properly pointed out, the court then analyzed the controversy as one peculiar to the particular litigants, therefore, an isolated incident not calculated to illuminate future disposition of cases involving the same claimed deprivation of constitutional rights.

The situation presented by the present controversy seems very close to *Rice.* Petitioner's counsel carefully ignores, in his *Statement of the Case* the procedure whereby the Respondents secured a rehearing on the denial, by the Supreme Court of Illinois, of their Petition for Leave to Appeal. Apparently, their then counsel was unaware of it. By ignoring that basic fact, the Petition also ignores the fact that that procedure is now known by, and available to, all Illinois counsel who read the opinion of the Supreme Court of Illinois. The deprivation, if there was one, is, therefore, episodic and peculiar to this Petitioner-Administrator.

Conversely, we have the situation of the Supreme Court of Illinois. That court has a compelling interest in exercising its Constitutional mandate to administer and guide the courts of Illinois in the pursuit of the law of Illinois. Perhaps its original order of denial resulted in an inadvertent judgment contrary to that law. It still had available to it the procedure utilized to review the case. In review, it both corrected a misapplication of substantive law by the Appellate Court and the exercise by that same court of a power it did not possess.

This unanimous decision was, simply, an exercise by the Supreme Court of Illinois of its constitutional powers for the benefit of the judicial system of that State and all litigants before that judicial system.

This Petition for Writ of Certiorari should be denied.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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